(15)

No. 92-94

In The

Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Establishment Clause prohibits a public school district from placing a publicly employed sign language interpreter in a parochial school classroom on a day to day basis to transmit religious and other instruction from parochial school teachers to a deaf student.

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OPINIONS BELOW

Petitioners accurately have identified the applicable opinions below.

JURISDICTION

Respondent agrees with Petitioners' statement concerning jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioners' listing of Constitutional and statutory provisions involved in this matter, except that the listing also should include Art. II, § 12 of the Arizona Constitution, which provides:

> Section 12. The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

STATEMENT OF THE CASE

This case involves a demand by James Zobrest ("James"), a deaf student, and his parents (collectively the "Zobrests" or "Petitioners"), that Respondent Catalina Foothills School District (the "School District" or the "District"), place a public employee in the classrooms of Salpointe Catholic High School ("Salpointe"), a parochial high school in Tucson, Arizona, to serve as a sign language interpreter. JA 19-26.[1] The Zobrests demand that the interpreter, at public expense, and functioning as a public employee, convey both secular and religious instruction to James.

James, who entered the ninth grade at Salpointe in August, 1988, is profoundly deaf. JA 20, paragraph 5. He resides within the boundaries of the School District and attended the District's public schools for three years prior to enrolling at Salpointe. JA 87, paragraph 5; JA 88, paragraph 14. While he attended District schools, the School District provided him with a sign language interpreter.

In October, 1987, the Zobrests requested the School District to provide an interpreter for James at Salpointe. JA 93-94, paragraph 38. The Zobrests made this request based on the Individuals With Disabilities Education Act,

[1] "JA ___" refers to the Joint Appendix, together with the page number from the Joint Appendix where the citation appears. "R ___" refers to the Record in the United States District Court for the District of Arizona, together with the Docket Entry Number, as designated by the Clerk of the District Court, of the document where the citation appears. The District Court's Docket Sheet is found at JA 1-8.

20 U.S.C. §§ 1400 *et seq.* ("IDEA"),[2] which they claim not only permitted but required the School District to provide this service. The School District informed the Zobrests that, although it would provide an interpreter for James at any Arizona public high school,[3] it would have to determine whether it could lawfully provide one at Salpointe. JA 94, paragraph 39. The School District readily agreed to provide, and throughout James' high school years did provide, speech therapy services for James one and one-half hours per week at a District school. JA 88, paragraph 11.

The School District referred the interpreter issue to the Pima County, Arizona, Attorney's Office, which issued an opinion on April 26, 1988, indicating that the Zobrests' request would violate both the United States Constitution and the Arizona State Constitution. JA 94, paragraph 40; JA 10-18. Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), the County Attorney's opinion was referred to the Arizona Attorney General for review. The Arizona Attorney General issued a concurring opinion on June 27, 1988, agreeing that the fact

[2] Prior to 1991, the IDEA was known initially as the Education of All Handicapped Children Act, and then as the Education of the Handicapped Act, or the "EHA." Section 901 of Pub.L. 101-476, 104 Stat. 1103 (1990), changed the name references to the Individuals With Disabilities Education Act.

[3] During the time period relevant in this case, Catalina Foothills School District did not operate a high school. High school age students residing within the District's boundaries were permitted to attend any Arizona public high school with the public school tuition charge being paid by Catalina Foothills School District. *See* Arizona Revised Statutes § 15-824(A)(2) and (E)(2).

situation presented would contravene both the state and federal constitutions. JA 94, paragraph 41; JA 9. The School District informed the Zobrests on July 11, 1988, that it would obey the dictates of the Attorney General opinion. JA 94, paragraph 41.

The Zobrests filed suit against the School District in the United States District Court for the District of Arizona on August 3, 1988. R1. On August 12, 1988, the District Court denied the Zobrests' request for a preliminary injunction. JA 52-53. On July 18, 1989, the District Court granted the School District's motion for summary judgment and, solely on constitutional grounds,[4] dismissed the case. R45. The Court of Appeals for the Ninth

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[4] Both parties' motions for summary judgment raised only federal constitutional issues. Therefore, when the District Court ruled on the federal constitutional issues, all other issues in the case were left unadjudicated. The Zobrests assert on numerous occasions in their brief that the School District has conceded that the interpreter services at issue here are legally mandated by the IDEA for every student who voluntarily attends a private school, whether parochial or nonparochial. *See* Petitioners' Brief on the Merits ("P.Br.") at pp. i, 3, 5, 6, 8-9, 22. This is not the case. The question of whether or not the IDEA requires (as opposed to permits) the School District to furnish James Zobrest with a sign language interpreter at any private school he chooses to attend – whether or not parochial – has never been determined in court or stipulated to by the School District. The School District denied the allegation contained in Petitioner's Amended Complaint in this regard, JA 56, paragraph 15, and the only stipulation on this issue was that the District would have been required to provide an interpreter for James at any PUBLIC high school he chose to attend. JA 88, paragraphs 13, 15. *See also* footnote 17, *infra*.

Circuit affirmed. *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992).

Salpointe, a private coeducational Catholic high school operating under the direction of the Carmelite Order of the Roman Catholic Church, is pervasively religious in character. JA 90, paragraph 19. Salpointe has as its distinguishing purpose the inculcation in its students of the Roman Catholic faith and morals. JA 90, paragraph 22. It would not exist but for that goal. JA 90, paragraph 22.

Religion is a required subject at Salpointe. JA 90, paragraph 23. In religion class, all students receive formal instruction in the Roman Catholic faith. Mass is celebrated at Salpointe at the beginning of each school day, and Catholic students are strongly encouraged to attend. JA 90, paragraph 24.

The two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe. JA 92, paragraph 31. Salpointe maintains a religious atmosphere within the physical premises of the school through the use of Catholic religious symbols and the observance of Catholic religious customs. JA 92, paragraph 30. Teachers at Salpointe sign a Faculty Employment Agreement that states that the religious programs "are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other." JA 90, paragraph 25. The Faculty Employment Agreement requires teachers of both secular and religious topics not only to accept, but also to promote, the relationships between the religious, the academic and the

extracurricular. JA 91-92, paragraphs 26-29. In this regard, Salpointe teachers assist students in experiencing how the presence of God is manifested in nature, in human history, in the struggles for economic and political justice, and in other secular areas of the curriculum. JA 92, paragraph 28. Thus, references or statements of a religious nature may or are likely to occur during the course of any of the class sessions. JA 92, paragraph 32.

The parties have stipulated that, for the purpose of evaluating Establishment Clause considerations, the religious character of Salpointe is not limited in any manner. JA 92, paragraph 33.

The interpreter's active involvement in religious activities within the Salpointe classrooms is undisputed. As the Zobrests note: "[t]hat the interpreter conveys religious messages is a given in this case." P.Br. at 22. The Zobrests have neither attempted to estimate, nor claimed that it is possible to estimate, the amount of time the interpreter would spend on religious as opposed to secular tasks. Rather, the Zobrests' demand in this case is that the School District hire the interpreter, using federal, state and local tax monies,[5] to interpret during all of

[5] Although the IDEA provides financial grants to states to assist in the education of disabled children, the federal monies provided cover only a fraction of the costs associated with such programs. The remaining monies come from state and local taxes. For example, during the 1987-1988 fiscal year, federal funds accounted for approximately 11% of the $190,000,000.00 spent on special education and related services in Arizona. U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children With Disabilities*, A-209 (Table

James' activities at Salpointe, including religion class, Mass and his other classes and extracurricular activities. It is against this background that the issues of this case must be analyzed.

SUMMARY OF ARGUMENT

The Zobrests demand that the School District place a public employee at James Zobrest's side in the pervasively sectarian atmosphere of a parochial school classroom to transmit to James every component of his religious and secular education. However, because the employee at issue here would participate in the transmission of religious concepts, the interpreter's services become directly related to the primary, religious oriented educational goals of both Salpointe and the Zobrests. The interpreter's activities thus have a primary effect of promoting religion.

As a result of the unique nature of the government services at issue here, this case is distinguishable from other cases where this Court has approved government activity that only incidentally aids religion. In this regard, this case does not involve: (1) a hands-off payment of money or a tax deduction where government involvement ends with the disbursement of funds or the tax deduction; (2) religious and secular activities that can be isolated from each other to ensure that government participates only in secular functions; (3) an educational

AH1)(1992) (Filed with the Court by the United States as *Amicus Curiae*).

institution that is other than pervasively sectarian; (4) an educational institution that serves adult students; (5) only a risk, as opposed to a certainty, that the government actually will participate in the communication of spiritual instruction; or (6) a government practice that has received historical acceptance. Rather, this case involves a demand for actual and direct participation by a public employee in religious activities.

The Zobrests' suggested justification that most of the interpreter's communications are secular is contrary to the stipulated facts of this case. In addition, government participation in religious education is inappropriate despite the fact that secular education also is promoted.

The Zobrests' argument that the interpreter is little more than a hearing aid or a machine is unpersuasive for many reasons. Of primary importance is the stipulated fact that the interpreter would be involved in communicating religious information to and from James. Use of public funds to supply either a person or a mechanical device to parochial school students is constitutionally impermissible if, as here, the person or device assists in the task of imparting religious instruction. The interpreter is distinguishable from a hearing aid because a hearing aid is used continuously and has no particular association with a child's parochial school education. In contrast, human services or mechanical devices that are provided only for a student's educational use survive Establishment Clause scrutiny only if the services or devices are used in a purely secular manner. Here, the interpreter would be supplied solely for educational purposes and would serve as a conduit for the transmission of religious information. The interpreter's efforts thus

would violate the Establishment Clause. In addition, because the interpreter is not a mechanical device, but a human being, the potential for political divisiveness, and the appearance of endorsement of religion, are far greater for a publicly employed interpreter as compared to a publicly purchased hearing aid.

The School District is not attacking the IDEA on its face, but rather challenges only this particular application of it. Thus, it is unimportant that a single individual is the focus of this case. In addition, the Zobrests' claim that the requested services are valid *per se* because they emanate from a general welfare benefit program lacks merit because even a general welfare benefit program may, at least in particular applications, improperly promote, endorse or coerce religious orthodoxy. This is such a case.

Because a factual comparison of this case to a formidable line of Supreme Court cases demonstrates that the Zobrests' demands are unconstitutional, reassessment of the *Lemon* test is not necessary. Nevertheless, the School District would prevail in this case not only under a *Lemon* analysis, but also using an endorsement analysis, a non-coercion-proselytization analysis or an analysis of historical traditions. The Zobrests' demand, in effect, is that the state assist religious proselytization. Their demand, if sustained, would coerce the School District and its administrators, employees and taxpaying constituents to provide the means by which James Zobrest seeks to develop spiritually.

Finally, the School District's decision not to assist James' religious development does not unconstitutionally inhibit his practice of religion because the IDEA does not

legally compel the School District to conform to the Zobrests' religious wishes. Moreover, the School District's decision is appropriate to avoid a violation of state and federal constitutional principles and policies.

No precedent of this Court has ever permitted government to lend its resources and assistance directly to the pursuit of a religious educational mission. To do so now would run contrary to decades of firmly established First Amendment jurisprudence.

ARGUMENT

I. A LEGAL MANDATE TO PLACE A PUBLICLY EMPLOYED SIGN LANGUAGE INTERPRETER IN A PAROCHIAL SCHOOL CLASSROOM CANNOT BE RECONCILED WITH EXISTING PRECEDENTS

If this Court were to grant the relief desired by the Zobrests, it would, for the first time, authorize the placement of a public employee in a parochial school classroom to assist directly in the inculcation of religious values to a student. In every class session over the course of James' four years of high school, the public employee would serve as a conduit for all religious and non-religious observances and communications to and from James Zobrest, thereby becoming an indispensable component in James' religious development and education. At public expense, the sign language interpreter would become James' and Salpointe's partner and coparticipant in James' religious studies. This direct, day in and day out governmental participation in religious education cannot be reconciled with the First Amendment.

As important as it is to determine what this case involves in terms of identifying and applying Constitutional principles, it is equally important to recognize what it does not involve. This case does not remotely involve any fact situation where this Court previously has approved government activity that incidentally aided religion.

First, despite the Zobrests' extensive reliance on *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Mueller v. Allen*, 463 U.S. 388 (1983), P.Br. at 15-17, this case involves neither a statutory scheme whereby a disabled student is provided funds[6] to defray educational expenses nor a scheme permitting a tax credit or deduction for this same purpose. If such were the case, then the sign language interpreter would be the student's employee, not the School District's, and governmental involvement in the enterprise would end with the disbursement of funds or the granting of the tax credit or deduction. By contrast, here the government's involvement does not end with a one time payment, as in *Witters*, or a tax deduction, as in *Mueller*. Rather, in this case, government involvement and participation in James Zobrest's religious development and education would continue every day that James attends Salpointe.

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[6] The IDEA does not authorize a school district to pay monies to a student or his or her parents so that the student and the parents can obtain for themselves the special education services. The constitutionality of such a direct funding scheme is immaterial because (i) Congress has not yet provided for such *and* (ii) the facts of this case concern the Zobrests' unambiguous demand for a publicly employed interpreter. JA 24.

This also is not a case where public assistance to private education can be upheld because the religious aspects of the institution can be and have been isolated from the secular aspects and the assistance flows only to secular functions or activities. *See Committee for Public Education v. Regan*, 444 U.S. 646 (1980) (approving the provision of funds to parochial schools for standardized testing because the secular content of the tests could be verified in advance); *Wolman v. Walter*, 433 U.S. 229 (1977) (approving the provision of textbooks, standardized tests and diagnostic services to parochial schools with verification of secular content); *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976) (approving state grants for secular purposes to private, religiously affiliated colleges because the colleges receiving aid were not so pervasively sectarian as to preclude a separation between secular and religious activities); *Meek v. Pittenger*, 421 U.S. 349 (1975) (approving the provision of textbooks whose purely secular contents could be verified in advance); *Hunt v. McNair*, 413 U.S. 734 (1973) (approving expenditures of public bond monies to finance a construction project at a religiously affiliated college to be used only for secular purposes); *Tilton v. Richardson*, 403 U.S. 672 (1971) (approving public monies spent to provide secular-use buildings on religiously affiliated college campuses because the secular and religious functions of the campus facilities at issue could be distinguished; *Board of Education v. Allen*, 392 U.S. 236 (1968) (approving the provision of textbooks whose secular contents could be verified in advance).

In contrast with the above cases, in this case the Zobrests' demand is that the interpreter's publicly

financed efforts include interpreting Mass, religion class and all of the other religious references made in James' classes throughout the day.

In addition, this is not a case involving only the possibility, as opposed to a certainty, of government participation in religious education. *See Aguilar v. Felton*, 473 U.S. 402 (1985) (Title I funds may not be used to pay public employees to provide remedial instruction within parochial schools because of the potential risk that they may be induced to teach religious values); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) (state supported remedial instruction and community education programs in parochial schools condemned because religious instruction might occur); *Wolman v. Walter*, 433 U.S. 229 (1977) (instructional materials may not be provided to parochial school students at public expense because the instructional materials might be subverted toward religious ends). In contrast with the above cited cases, this case involves more than just the possibility that the public employee would be involved in religious instruction. As Petitioners themselves poignantly state: "[t]hat the interpreter conveys religious messages is a given in this case." P.Br. at 22. Thus, this case presents a much stronger case than does *Aguilar*, *Grand Rapids*, or *Wolman* with respect to the existence of constitutionally inappropriate conduct.

This also is not a case involving higher education, where the maturity of the students can be expected to be at an adult level. *See Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students are, of course, young

adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."); *Tilton v. Richardson*, 403 U.S. 672, 685 (1971) (recognizing the "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools").

In addition, this case must be distinguished from those where the religious institution at issue is not pervasively sectarian. *See Bowen v. Kendrick*, 487 U.S. 589, 620 (1988) (facial Establishment Clause attack against the Adolescent Family Life Act, 42 U.S.C. §§ 300z *et seq.*, unsuccessful because none of the recipients of federal funds was found to be pervasively sectarian; the Court noting that "as applied" challenges would be available if a particular recipient was determined to be pervasively sectarian); *Tilton v. Richardson, supra*, (construction grants to religiously affiliated colleges for facilities restricted to secular uses upheld because the colleges at issue were not pervasively sectarian).

Finally, this case does not involve a traditional government practice that has existed relatively unchallenged throughout this country's history. *See Marsh v. Chambers*, 463 U.S. 783 (1983) (Chaplain's prayer in a state legislature is permissible because it is supported by tradition and 200 years of unchallenged history).

In summary, this case is distinguishable from those where this Court previously has permitted government activity at religiously affiliated schools. In this case, James requires the direct assistance of two specially trained individuals in order to receive an education: a

teacher and an interpreter. These two adults must work together day in and day out[7] to educate James. Each of these two persons is active in and indispensable to the educational process. The legal difficulty in this case results from the Zobrests' demand that one member of this instructional team be a parochial school teacher conveying religious as well as secular instruction and the other be a public employee. No existing precedent permits this.

II. UNDER PRECEDENTS FOLLOWING THE TEST SET OUT IN *LEMON V. KURTZMAN*, THE PLACEMENT OF A PUBLIC EMPLOYEE TO PROVIDE SIGN LANGUAGE INTERPRETER SERVICES IN PAROCHIAL SCHOOL CLASSROOMS VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court defined a three part test to assist in determining Establishment Clause violations. This test, which has come to be known as the *"Lemon"* test, is considered particularly applicable to cases involving the education of primary and secondary school age children. *Grand Rapids School*

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[7] The School District is not suggesting that all situations where a public employee is in or about a parochial classroom on a daily basis raise constitutional issues as serious as those raised in this case. For example, in a situation where a parochial school student requires clean intermittent catheterization of the type described in *Irving Independent School District v. Tatro*, 468 U.S. 883, 885 (1984), a public employee providing the needed service would not be involved directly in the process of imparting religious instruction. *See generally, Bowen v. Kendrick*, 487 U.S. 589, 624-25 (1988) (Kennedy, J., concurring).

District v. Ball, 473 U.S. 373, 383 (1985). The *Lemon* test condemns government action if its purpose is other than secular, if its primary effect is to benefit or promote religion, or if the government activity fosters an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-613.

The School District concedes that the IDEA has an appropriate "secular purpose." The present controversy centers instead on the second and third prongs of the *Lemon* test – primary effect and excessive entanglement. A review of the judicial decisions applying these two parts of the *Lemon* test reveals that the lower court decisions in this case should be affirmed.

A. The Placement Of A Publicly Employed Interpreter In A Catholic Classroom Has the Primary Effect of Benefitting and Promoting Religion.

In this case, the publicly financed interpreter services at issue would facilitate religious instruction and other religious activities being offered to James Zobrest in Salpointe's parochial school classrooms. Because of this direct involvement in religious instruction and religious activities, the services the interpreter provides would have the primary effect of benefitting and promoting the religious goals of both the Zobrests and Salpointe.

The Zobrests place emphasis on cases that permitted loans of secular textbooks directly to parochial students or allowed public busing of parochial students or permitted other "incidental" forms of public assistance. *See Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Education v. Allen*, 392 U.S. 236

(1968); *Everson v. Board of Education*, 330 U.S. 1 (1947). P.Br. at 19-20. In *Meek v. Pittenger*, however, this Court explained that government aid provided to a religious school is permissible as an "incidental benefit" only when that aid constitutes *"secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school."* *Meek*, 421 U.S. at 364 (emphasis supplied). Secular textbooks may be provided in private schools, therefore, because it is relatively easy to verify in advance that their contents are in fact completely secular. *Meek v. Pittenger*, 421 U.S. 349, 362 (1975); *Board of Education v. Allen*, 392 U.S. 236, 245 (1968). The state may not provide religious texts, even if they were provided to the children rather than to the school. *Board of Education v. Allen*, 392 U.S. 236, 244-45 (1968). Similarly, transportation services to or from school are permissible because by their very nature they are separate from the educational activities occurring in the classroom. *See Wolman v. Walter*, 433 U.S. 229, 253-54 (1977). In contrast, transportation services cannot be provided for private school field trips because these services are more closely linked with the actual education process. *Id.*

Despite the fact that secular textbooks and certain transportation services can be provided to parochial school students, educational materials and mechanical devices such as projectors, tape recorders, record players, maps, globes, science kits and weather forecasting charts may not be provided. *See Wolman v. Walter*, 433 U.S. 229, 248-51 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362-66 (1975). These instructional materials provide more than an "incidental benefit" to pervasively sectarian schools

because of the possibility that they could be used, intentionally or unintentionally, for religious purposes and to facilitate religious instruction. *Id.* at 366. So it is with the interpreter in the present case. His or her services would facilitate and become directly involved in Salpointe's mission of nurturing Christian ideals in its students through the communication of religious concepts and values.

Importantly, the Zobrests chose Salpointe over a public school *solely* to further James Zobrest's religious development. JA 89, paragraph 16. The interpreter, therefore, not only would further the religious mission of the school, but also would substantially and directly further the religious mission of the Zobrests. Viewed either way, the requested government aid would be improper.

B. The Placement Of A Publicly Employed Interpreter In A Parochial School Classroom Creates Excessive Entanglements Between Church And State.

Because Salpointe is "pervasively religious in character," JA 90, paragraph 19, the continuing presence of a publicly employed sign language interpreter in every class session that James attends at Salpointe, and the interpreter's continuing involvement in all religious and nonreligious activity conducted therein, constitute a continuing and excessive entanglement in violation of the third prong of the *Lemon* test.

The Zobrests summarily dismiss this entanglement between the School District and James' religious education, and suggest that, like the permissible diagnostic services in *Wolman v. Walter*, 433 U.S. 229 (1977), there is little or no danger of government participation in the religious function of Salpointe. P.Br. at 17. The Zobrests then suggest that the sign language interpreter's code of ethics precludes him from participating in religious instruction. *Id.* The Zobrests are wrong. The sign language interpreter's code of ethics is precisely what makes the interpreter an active participant in every religious discussion that occurs in James' classes. In this regard, it must be remembered that the likelihood of religious communications at Salpointe, even in secular classes such as government, science or history, is far from the speculative danger noted in *Wolman* – it is a stipulated fact. JA 92, paragraphs 28-32. This day to day participation by the sign language interpreter in James Zobrest's religious development presents unconstitutional entanglement.

This case involves the classic entanglements that were feared by the Court when the entanglement concept was first developed in *Walz v. Tax Commission*, 397 U.S. 664 (1970), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As originally conceived, the entanglement prong of the *Lemon* test prohibited situations where government action produced ongoing, actual and direct interaction between government and religion, or "a kind of continuing day to day relationship" between employees of the public entity and representatives of the religious organization. *Walz*, 397 U.S. at 674. This is not a case where the entanglements involve no more than public administrative supervision designed to guard against speculative risks of

public intrusion into religious education. *See Aguilar v. Felton*, 473 U.S 402 (1985); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). This also is not a case involving a one time financial grant such as the one approved in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), or a tax deduction such as the one approved in *Mueller v. Allen*, 463 U.S. 388 (1983). In these cases the relationship between the state and religion did not continue beyond the disbursement of funds or the tax deduction. This case, in contrast, involves actual, continuing day to day involvement of a public employee in a student's religious education.

There also would be substantial entanglements resulting from evaluation of the interpreter's job performance, which is needed for salary and other employment-related issues, as well as for issues related to the District's responsibilities under the IDEA.[8] Because the sign language interpreter would be a publicly paid employee, he or she would be subject to School District policies, supervision and evaluations, and even possible disciplinary

[8] These responsibilities include a required annual meeting to discuss, develop and, if necessary, modify each student's individualized education plan. Persons who must attend this meeting and who jointly are expected to develop the student's individualized education plan include the student's parents, the student if appropriate, District special education professionals and at least one of the student's teachers, which in this case would be a parochial school teacher. 34 C.F.R. §§ 300.343 and 300.344.

action,[9] all of which would contribute to the entanglements between Salpointe and the School District.

C. The Reasons Presented by Petitioners To Justify Public Participation In Religious Instruction Lack Merit.

The Zobrests make four arguments that they claim distinguish this case from precedents that preclude governmental participation in religious education. Their arguments are that (1) the religious indoctrination constitutes only a modest portion of all of the instruction provided at Salpointe, P.Br. at 9-11; (2) the sign language interpreter is little more than a machine, such as a hearing aid, P.Br. at 17-18; (3) a single sign language interpreter does not constitute a massive intrusion upon religion, P.Br. at 19; and (4) the sign language interpreter's presence in parochial classrooms should be permissible *per se* because the interpreter would be provided as part of a general welfare benefit program. P.Br. at 15-17. These arguments, however, neither provide a meaningful distinction to the established precedents nor

[9] The entanglements would be particularly acute if it became necessary for the District to consider taking adverse job action such as a reprimand, suspension or dismissal. *See, e.g., Sedalia School District v. Missouri Commission on Human Rights*, Case No. 45447 (slip opinion) (Mo.App. 1992) (public school district justified in firing high school sign language interpreter who modified language she found objectionable). In such a situation, the right of the interpreter to receive due process may create the need for extensive administrative interaction and cooperation between School District administrators and parochial school employees.

justify the unconstitutional effect of the interpreter's activities. Each of the Zobrests' arguments will be addressed in order below:

1. Initially, the Zobrests argue that the effect of assisting religious practice and education somehow is diluted because the interpreter communicates mostly secular instruction or that, when compared to secular communications, the religious communications constitute only a modest portion of the total instruction provided at Salpointe. P.Br. at 9-11.[10] This argument fails for at least two reasons. First, the Zobrests' assertion is contrary to the stipulated facts in this case, including the fact that the religious educational activities and discussions at Salpointe "are not separate from the [secular] academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other." JA 91, paragraph 25. Thus, purely secular instruction does not exist at Salpointe. Stated in another manner, the Zobrests cannot now ignore their own stipulation that the religious character of Salpointe is not limited in any material manner. JA 92, paragraph 33.

More importantly, the Establishment Clause does not excuse governmental participation in religion simply because, as the Zobrests suggest, a substantial amount of

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[10] The Zobrests state in their brief that "[t]he services of the interpreter for James at Salpointe produced *multiple* effects, most of these being identical to the secular effects produced in public schools and undeniably constituting, quantitatively, the predominant education effect." P.Br. at 10 (emphasis in original). This statement recognizes, implicitly if not expressly, that one effect of the interpreter's publicly financed efforts would be to further James' religious development.

secular instruction also is assisted. A government program to provide textbooks to needy parochial school students could not also provide copies of the Bible or the Koran to these students, even if these religious books constituted only a relatively minor percentage of the books provided. Similarly, the prayers in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), were not excused even though their duration encompassed only a few minutes in a program lasting several hours. The practical effect of the Zobrests' argument would be that public school students could be taught to read by using scriptures or that the buildings described in *Tilton v. Richardson*, 402 U.S. 672 (1971), could be used for religious instruction, so long as the ratio of these religious activities to other secular activities did not exceed some undefined percentage. This is clearly incorrect and untenable: "*[A]ny* use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (emphasis in original).

2. The Zobrests next seek to minimize or mitigate the role of the sign language interpreter by characterizing the would-be public employee as a machine, such as a hearing aid, that mechanically repeats to James the religious information that is disseminated by the Salpointe faculty. P.Br. at 17-18. This argument fails, however, for a number of reasons. Initially, and perhaps most importantly, government may not place even a "machine" in a parochial school if the machine has the potential to be used to facilitate religious instruction. *Wolman v. Walter*, 433 U.S. 229 (1977), and *Meek v. Pittenger*, 421 U.S. 349 (1975), hold unequivocally that "projectors, tape recorders, record players, maps and globes, science kits,

weather forecasting charts, and the like," *Wolman*, 433 U.S. at 249, may not be placed at government expense in a pervasively sectarian school atmosphere. *Wolman*, 433 U.S. at 248-51; *Meek*, 421 U.S. at 362-66. To the extent that a sign language interpreter may be construed to be a machine, the use of an interpreter to facilitate religious instruction in a pervasively sectarian parochial school cannot be reconciled with *Meek* and *Wolman*.

In fact, the sign language interpreter in this case goes beyond the seemingly secular mechanical devices and instructional materials condemned in *Meek* and *Wolman*. The decisions in *Meek* and *Wolman* turned on the pervasively sectarian nature of the educational institutions benefitted by the aid, because at these schools secular education and the religious mission were "inextricably intertwined." *Meek*, 421 U.S. at 366. Thus, although the mechanical devices and instructional materials "ostensibly" appeared to be secular and neutral, the Court concluded that, because of the pervasively sectarian setting, the possibility existed that they could be used in religious activities. *Meek*, 421 U.S. at 366. This case requires none of the extended analysis employed in *Meek* and *Wolman*. This is because the stipulated facts here are that the sign language interpreter definitely would be used to assist religious instruction at Salpointe.

It is not sufficient to argue that a public employee's participation in religious indoctrination is permissible because it is in some manner "mechanical." It is still actual and direct involvement in religious indoctrination, which always has been and must remain constitutionally impermissible. A few examples bear this out. A publicly paid teacher could not lead the class in a religious prayer,

even if the teacher happened to be an atheist and was reading without comment from scripts chosen daily by students or others. *See generally, Abington School District v. Schempp*, 374 U.S. 203 (1963). Similarly, public funds could not be used to set up and operate a print shop at Salpointe Catholic High School to photocopy "mechanically" items submitted by the Salpointe faculty if such photocopying would include religious books and materials. This is true even if we assume that the publicly paid employees in the print shop would be obligated to copy only those items submitted by faculty members and would not be permitted to designate items to be copied or alter their contents. It remains true even if the print shop copied many more secular educational materials than religious materials. The Establishment Clause simply would not permit this public resource to be used to provide multiple copies of the day's scripture lesson.

Finally, assume that the Arizona legislature, after determining that a certain class of disadvantaged students in both public and private schools would benefit significantly by being read to more frequently, funds the hiring of "readers" to read for one hour each day to these students. Assume further that this funding scheme provides that the school principal at each school designates the items to be read to the students, which task is then accomplished without explanation, comment or alteration by the "reader." Would the Establishment Clause permit this activity to occur in parochial school classrooms if the readers are given religious as well as secular materials to read? Of course not. The First Amendment would prohibit this result despite the fact that the reading is being

done by public employees in a purely "mechanical" fashion.

Stated in the context of this case, public funds cannot be used to employ a person whose job it is to inform James Zobrest that Christ died to save him from his sins, or that there is life after death, even if the public employee is relaying that message from another person.

The Zobrests' analogy to a hearing aid also is unpersuasive because there is a critical difference between a hearing aid and a public employee doing the work of a hearing aid in a parochial school classroom. This difference is the association between the public assistance and the religious educational atmosphere.[11] A hearing aid is something that generally is used all the time and has no particular association with education (even if educational authorities supply the hearing aid). A public employee, on the other hand, hired solely to assist in the parochial education of a student, is more analogous to the tape recorders, record players and other mechanical devices and instructional materials addressed in *Wolman v. Walter*, 433 U.S. 229 (1977) and *Meek v. Pittenger*, 421 U.S. 349 (1975). Unlike a hearing aid, the interpreter here and the

[11] This Court has previously expressed concerns that, in appropriate cases, a symbolic union between church and state presents constitutional problems. *Grand Rapids School District v. Ball*, 473 U.S. 373, 389 (1985). A public employee hired solely to assist James in receiving a parochial education creates such a symbolic union to an extent that does not occur with the provision of an inanimate hearing aid.

mechanical devices and instructional materials condemned in *Meek* and *Wolman* are designated for the singular purpose of facilitating instruction. Established precedent prohibits the placement of these latter items into the pervasively sectarian atmosphere of a parochial school.

Finally, the Zobrests' hearing aid analogy is unpersuasive because a human being simply is not a hearing aid. A reasonable person reacts much differently to the presence of a public employee in a parochial school classroom than that person does to the existence of a publicly purchased hearing aid. The appearance of endorsement, *see Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J. concurring), as well as the potential for political divisiveness, *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971), is drastically different when a publicly purchased hearing aid is compared to a public employee who sits daily in a parochial school classroom delivering religious as well as secular information to a student. The interpreter reasonably would be viewed as a part of the educational "team" serving James Zobrest. A hearing aid would not.

In this regard, what happens "between classes" also must be considered. The sign language interpreter would accompany James Zobrest on a continuous basis at school and would be one of the few people if not the only person there with whom James could communicate directly with ease. James undoubtedly would engage in normal day to day conversations with the interpreter on topics such as sports, the weather and so on. It is at least as likely that their conversations on some occasions would relate to James' schooling. If James asks the interpreter a question

concerning either a teacher's lesson that day or a discussion that occurred in class, what is the interpreter supposed to do? Not respond? Can he or she respond? Or can the interpreter respond only if he or she believes that the lesson or discussion being referenced was secular in nature? We simply cannot anticipate that James Zobrest would spend twenty-five hours a week in close contact with another person without developing a normal interpersonal relationship with him or her.[12]

In summary, the sign language interpreter cannot be excused as nothing more than a "hearing aid." Established precedents demonstrate that not even mechanical devices may be provided to parochial school students for their use in school unless the use of such items can be limited to purely secular activities. The hearing aid analogy itself is unpersuasive because hearing aids are provided for general use, as opposed to strictly educational use. In contrast, the interpreter in the present case would be provided solely for educational purposes and his or her efforts would not be limited to secular activities. Given these circumstances, no analogy can change the

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[12] The Zobrests make the statement in their brief that James Zobrest was not sent to Salpointe to become a religious "zombie." P.Br. at 10. The School District agrees but points out that neither is the interpreter a "zombie." The Zobrests' attempt to turn the interpreter into an emotionless, nameless machine flies in the face of human logic. Just because the School District does not contest the fact that, when interpreting, the interpreter will not violate applicable canons of ethics, does not mean that the interpreter at other times will be devoid of thoughts and opinions or that he or she will communicate and interact with James or others at Salpointe in other than a normal fashion.

fact that the interpreter's activities would violate the First Amendment.

3. The Zobrests also suggest that the government's participation in religious instruction at issue here should be permitted because this case involves only one sign language interpreter for one student,[13] rather than the large scale programs condemned in *Wolman v. Walter*, 433 U.S. 229 (1977) and *Meek v. Pittenger*, 421 U.S. 349 (1975). P.Br. at 19. This position, however, ignores the obvious fact that the precedential impact of this case will be much greater than "one interpreter."[14] More importantly, however, the Zobrests' argument about "one interpreter" might be more persuasive if the School District was attacking the IDEA on its face, which it is not doing, instead of objecting only to the application of this statutory scheme to the particular fact situation under review. *See Bowen v. Kendrick*, 487 U.S. 589, 601-02 (1988) (Adolescent Family Life Act, 42 U.S.C. §§ 300z *et seq.*, upheld against a facial Establishment Clause attack with the limitation that particular applications remain subject to challenge).

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[13] The Zobrests claimed previously that this case will have substantial nationwide impact, particularly with respect to the education of disabled children. *See* Petition for Writ of Certiorari at 11-12. Thus, they cannot in good faith claim that this case involves no more than the single sign language interpreter at Salpointe.

[14] In 1990-1991 the IDEA served 4.3 million students, including 60,000 hearing impaired children. *See* Brief of United States as *Amicus Curiae* at 4. It is also important to recognize that a significant number of special education students require the assistance of one on one teacher's aides to assist them in the classroom.

Under the School District's narrow "as applied" challenge, it makes no sense to argue that the proportion of public funds being used inappropriately is relatively small. Arizona could not hire one teacher to teach class at Salpointe for the same reasons that it could not hire five hundred teachers to teach in parochial schools across the state. Public funds could not be used to pay for Bibles for use by one religious studies class at Salpointe for the same reasons that Bibles could not be purchased with public funds for every parochial school student in Arizona. In this regard, the one sign language interpreter at issue in this case, who by stipulation would be involved in religious activities, fares worse than the millions of dollars worth of services and materials that were condemned in *Aguilar v. Felton*, 473 U.S. 402 (1985), *Wolman v. Walter*, 433 U.S. 229 (1977) and *Meek v. Pittenger*, 421 U.S. 349 (1975), where the services and materials only had the potential to be subverted to religious use.

4. Finally, the Zobrests suggest that the Establishment Clause is satisfied whenever the government provides a general welfare benefit program to a large class of persons defined without regard to the religious/nonreligious and public/nonpublic nature of the persons or institutions benefitted, especially where any aid to religion results from what they term private choices of individual beneficiaries. P.Br. at 15-17. In support of this proposition, they rely on *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487-88 (1986) and *Mueller v. Allen*, 463 U.S. 388, 398 (1983). The Zobrests' argument in this regard is fatally flawed, however, because no court has ever said that application of a general welfare benefit program of the type described

above always satisfies the Establishment Clause. To the contrary, a general welfare benefit program will be deemed to violate the Establishment Clause if, as in this particular case, it has the effect of providing a direct subsidy to religious instruction and development, *see Witters*, 474 U.S. at 487; *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988), or, also as here, it fails to maintain a secular, neutral and nonideological content. *See Tilton v. Richardson*, 403 U.S. 672, 687 (1971).

Situations easily can be envisioned where particular applications of a general welfare benefit program would have the effect of promoting or subsidizing religious activity and therefore would be unconstitutional. For example, a general welfare benefit program that would provide all school children with assigned texts free of charge for every class of any accredited school they choose to attend, whether public or private, would result in the purchase and provision of religious texts at public expense, which is constitutionally prohibited. *See Board of Education v. Allen*, 392 U.S. 236, 248 (1968).

As another example, assume that Congress, after determining that a certain class of disadvantaged children are in need of tutorial services to supplement their schooling, passes a "general welfare" law to provide to each such student one hour per week of tutoring services at the student's school of choice. For a disadvantaged child enrolled in a parochial school and performing poorly in religion class, however, the publicly employed tutor's statutorily mandated job duties obviously would run afoul of the Establishment Clause.

As a final example, apply the IDEA itself to any student who makes the "private choice" to attend a parochial school but requires, due to a disability, a one on one aide in the classroom to assist the student educationally. Because the aide in effect would be team teaching with the parochial school teachers, this relatively common situation could not be facilitated by the IDEA without running afoul of Establishment Clause limitations.

The above examples demonstrate that well intentioned general welfare benefit programs, including ones that operate in most instances within legal bounds, can have specific applications that are constitutionally prohibited. This is true even though the constitutionally prohibited fact situations result from the "private choices" of students to attend parochial schools.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), this Court held that a general welfare benefit program no more than incidentally assists religious education and is thus permissible only where the aid is "in the form of secular, neutral or nonideological services, facilities or materials." *Id.* at 687. Therefore, in *Tilton*, the Court approved the use of public funds to construct secular use buildings on religiously affiliated college campuses, but struck down as unconstitutional a provision in the same statute that limited the secular use requirement to twenty years. *Id.* at 684. Similarly, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), an act providing federal monies to pay for services and research in the area of premarital and adolescent sexual relations was determined to be a general welfare benefit program capable of surviving a facial Establishment

Clause challenge. The Court remanded the matter, however, to determine whether, in particular situations, aid under the act flowed to pervasively sectarian institutions, *Id.* at 621.

In the present case, the School District poses no facial challenge to the IDEA. Rather, it supports generally the concepts and goals embodied in the IDEA, even as applied to private schools of all types.[15] It objects only to those situations where the IDEA's application would require one of its employees to become involved in any manner with religious indoctrination. The School District also acknowledges that the vast majority of IDEA services are provided in a manner consistent with Establishment Clause limitations. As the instant case demonstrates, however, situations can exist where publicly funded special education services cross the line defined by *Witters* and *Mueller* so as to involve government in religious activities. Because the publicly employed interpreter at issue in this case is directly involved in, and becomes an essential component in, James' religious education, his or her efforts cross this line and cease to be "secular, neutral [and] nonideological." *Tilton v. Richardson*, 403 U.S. at 687. As such, the interpreter's services cannot be constitutionally justified as a general welfare benefit.

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[15] For example, in this very case, the School District provided James offsite speech therapy throughout his high school tenure. JA 88, paragraph 11. It also supported James' decision to attend Salpointe rather than public school. R 10, Exhibit B. The School District notes that the offsite speech therapy probably assisted James considerably in completing successfully his religious education, a fact about which the School District has no objection.

III. UNDER ANY FORMULATION OF ESTABLISHMENT CLAUSE ANALYSIS, A PUBLIC EMPLOYEE MAY NOT INTERPRET RELIGIOUS INSTRUCTION IN A PAROCHIAL SCHOOL CLASSROOM.

The direct and continuous commingling of the functions of government and religious education that are at issue in this case cannot be reconciled with the First Amendment, regardless of whether the legal analysis used is the traditional *Lemon* formulation, an endorsement inquiry, *see Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), a coercion-proselytization inquiry, *see Allegheny County v. Greater Pittsburgh ALCU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), or a historical framework analysis. *See Lee v. Weisman*, 112 S.Ct. 2649, 2679 (1992) (Scalia, J., dissenting).

A. Existing Precedent Demonstrates That The Interpreter's Proposed Duties Would Violate The Establishment Clause.

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), this Court found it unnecessary to reconsider the Establishment Clause analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court in *Lee* found it sufficient to look at "controlling precedents" relating to prayer and religious exercises in the public schools to reach its holding that public schools could not permit invocations or benedictions at their graduation ceremonies. 112 S.Ct. at 2655.

Likewise, the present case can be decided without the necessity of restructuring twenty years of Establishment Clause jurisprudence. While *Lee* involved the narrow issue of whether public school officials could promote, coerce or endorse participation in a religious activity, the present case involves the similarly narrow issues of whether, under the purported justification of operating "mechanically," a public school employee may assist a student in receiving a religious education in a parochial school classroom, and whether public school officials and taxpayers can be legally coerced to fund this public employee to do so. A review of various cases decided since *Lemon* demonstrates that this case clearly falls within the range of prohibited conduct, without regard to where the outer limits should (or could) be drawn.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court struck down state statutes that attempted to subsidize secular instruction in private schools. Because the public employee in the present case would be hired to facilitate religious as well as secular instruction, his or her employment, with public funds, would present a far worse situation than that found in *Lemon*.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), a twenty year limitation on a restriction prohibiting religious use of publicly funded buildings constructed at religiously affiliated colleges was stricken as unconstitutional. The Court in *Tilton* noted expressly that public benefits and services could be provided to religiously affiliated institutions only so long as their secular content and secular use could be reasonably assured. *Id.* at 687. No such assurance is possible in the present case; to the contrary, a religious use of the public employee in this case is a

stipulated fact. It is also important to note that the interpreter at issue here is no more "mechanical" than were the buildings in *Tilton*.

Likewise, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court struck down state grants to private schools for maintenance and repair of facilities. As in the present case, the aid in *Nyquist* was condemned because the funds directly assisted both the secular and the religious aspects of the schools' operations, and there was no way adequately to separate the two functions.

In *Levitt v. Committee For Public Education*, 413 U.S. 472 (1973), the Court refused to permit the expenditure of public funds for nonstandardized testing and record keeping materials and services because of the danger that the teacher-prepared tests might be used to assist in the transmission of religious principles. The only material differences between *Levitt* and this case are that in *Levitt*, the vehicle for *potential* transmission of religious information was testing materials and services, whereas in the present case, the vehicle for transmission of religious information, which would be certain to occur, is the interpreter.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), the Court rejected attempts to apply public funds to pay for instructional materials and mechanical devices that had the potential to be used as tools to transmit religious instruction in parochial schools. In addition, public employees were precluded from coming onto private school grounds to provide auxiliary educational services and therapeutic services. The sign language interpreter in the present case is no less a

vehicle for religious instruction than the instructional materials and mechanical devices condemned in *Meek* and *Wolman*, and involves significantly greater interaction with the actual process of religious instruction than did either the therapists in *Wolman* or the auxiliary instructors in *Meek*.

In *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court struck down government schemes to provide remedial instruction in secular subjects by public employees on the premises of private schools. The Court in *Grand Rapids* also prohibited the hiring of private school employees to provide onsite community education services. The primary distinction between this case and the onsite services condemned in *Grand Rapids* and *Aguilar* is that the danger of government funded transmission of religious instruction was only speculative in *Grand Rapids* and *Aguilar*, but nonetheless deemed prohibited by the Establishment Clause, whereas in this case the publicly funded transmission of religious dogma is a factual certainty.

Finally, in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Court held that the Establishment Clause does not permit school officials to invite clergy to offer invocations and benedictions at public school graduation ceremonies. If the Court's precedents do not permit school officials to

allow clergy to offer brief prayers at a graduation ceremony, then the Court's precedents would not permit a public employee to assist in the direct proselytization of a student.

The above cases compel the conclusion that the decisions of the District Court and Court of Appeals in this case should be affirmed. A ruling to the contrary would be made at the expense of decades of Establishment Clause jurisprudence.

> It is not right – it is not constitutionally healthy – that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our own case law.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 45 (1989) (Scalia, J., dissenting).

B. The Government's Activities In A Parochial School Classroom In This Case Constitute Improper Endorsement, Coercion And Proselytization Of Religion And Are Without Historical Support.

No matter how this case may be dissected or analyzed, the public aid demanded by the Zobrests is unlawful. The result would be the same using an endorsement formulation, a noncoercion-proselytization formulation, or a historical framework formulation, as it is under a current application of the *Lemon* test.

Under an endorsement analysis, the government may not engage in activities that a reasonable person would

feel favor or endorse a particular religion or religion in general. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). Accordingly, improper endorsement of religion occurred in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), when public funds were used to pay parochial school teachers to instruct community education courses in the parochial schools. Religion was endorsed because government resources assisted parochial school teachers who were "accustomed to bring religion to play in everything they teach." *Id.* at 400 (O'Connor, J., concurring in the judgment in part and dissenting in part). Likewise, in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), government improperly endorsed religion when school officials permitted a rabbi to offer brief prayers at a public school function. Endorsement of religion is no less present here than it was in *Lee* because here the public employee actually participates in the transmission of religious information from a parochial school teacher to his audience, in this case the audience being a student.

Endorsement is viewed from the vantage point of a reasonable nonbeliever, *Lee*, 112 S.Ct. at 2658, and becomes unlawful even if the activity being challenged would seem, to most believers, to be reasonable. *Id.* Very reasonable nonbelievers would view the present case as the actual use of the machinery of government to assist in the transmission of religious orthodoxy within a parochial school classroom. In addition, "government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion." *Id.* at 2664 (Blackmun, J., concurring). In the present case, the School District Governing Board members and their employees and local taxpayers, as well as

the interpreter, are faced with pressure, attempted to be exerted by the Zobrests through the force of federal law, to participate in James' religious upbringing. The compulsion here is just as real as in *Lee*.

Another suggested formulation of Establishment Clause analysis is what may be termed a "noncoercion-proselytization" analysis. This analysis contemplates that the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in society. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). The principle that government may accommodate religion, however, does not supersede fundamental limitations imposed by the Establishment Clause:

> It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'

Lee v. Weisman, 112 S.Ct. 2649, 2655 (1992), *quoting Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

The elements of coercive governmental intrusion upon religion include excessive sponsorship, proselytization and compulsion for the benefit of religion. *See Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). These elements are present

in this case.[16] First, the Zobrests demand that government sponsor a necessary and substantial component of James' religious education, without which James could not participate in religious activities in the classroom. Secondly, the services demanded amount to publicly assisted proselytization. To the extent that the beliefs and principles of the Catholic faith are impressed upon James at school, this proselytization is facilitated by a public employee's efforts. Government may not accompany a street missionary and rebroadcast the missionary's message as he goes door to door seeking converts. Likewise, government may not accompany James into his religious classroom for the express (and stipulated) purpose of giving and receiving the ideals and principles that are so central to the Catholic educational process.

Finally, and perhaps most importantly, the public services demanded by the Zobrests would constitute unacceptable coercion in favor of religion because the public would be coerced to apply its tax dollars to assist in James Zobrest's spiritual development, and the School District's Governing Board members and employees, including the interpreter, would be coerced to participate in that development.

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[16] The Court has noted that coercion is not a necessary element of an Establishment Clause violation. *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963). However, as Justice Blackmun noted in *Lee*, the Establishment Clause will be violated if coercion is found to exist. 112 S.Ct. at 2664 (Blackmun, J., concurring).

Unlawful coercion need not necessarily take the form of a direct governmental compulsion to follow a particular faith or creed. Rather, unlawful coercion may occur in indirect forms such as taxation where public monies are used to support religious activity. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 659-61 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Improper coercion also can take the form of "subtle" and "indirect" pressure to participate in religious activity. *Lee v. Weisman*, 112 S.Ct. 2649, 2658 (1992).

In the present case, the coercion is equally or more substantial than that imposed upon the students and their parents in *Lee* who were compelled, at most, to listen with respect (but not to participate) while a brief prayer was offered at a public function. In contrast, in this case the public would be required to support financially James Zobrest's religious development by funding the interpreter's efforts. In addition, the School District Governing Board members, administrators and other school employees would be given the choice of acquiescing in the School District's involvement in James Zobrest's spiritual development or resigning their positions. The interpreter himself would be given the choice of immersing himself daily into a pervasively sectarian parochial atmosphere and participating in the associated religious activities, or foregoing public employment. These "choices," if imposed by the power of law, would be as abhorrent to the Establishment Clause as the choices faced by the spectators in *Lee v. Weisman*, 112 S.Ct. 2649 (1992).

The School District also would prevail in this case under an analysis that reviews the history and traditions

associated with the governmental activity being challenged. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983) (Chaplain's prayer in a state legislature is permissible under the Establishment Clause because it is supported by tradition and 200 years of unchallenged history).

During colonial times, and continuing until the 1820's and 1830's, public funding for *any* education, much less parochial education, was virtually nonexistent. *See Abington School District v. Schempp*, 374 U.S. 203, 238 n. 7 (1963). At the same time, the leaders of this then young country sought to remove the English colonial legacy of taxes imposed to support churches. *See Everson v. Board of Education*, 330 U.S. 1, 10-13 (1947); *Lee v. Weisman*, 112 S.Ct. 2649, 2673 (Souter, J., concurring). James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785), reproduced as an Appendix to *Everson v. Board of Education*, 330 U.S. 1, 63 (1947), was directed specifically at a proposed Virginia appropriation for "teachers of the Christian religion." The rise of Catholic parochial education in the mid-1800's produced nationwide sentiments against any public support for religious education. *See* Laycock, *"Noncoercive" Support For Religion: Another False Claim About The Establishment Clause*, 26 Valparaiso University Law Review 37, 52 (1991). The trend continues to this day, as evidenced by a long history of bitter litigation opposing public participation in and support of religious education, from *Everson* in 1947 to *Lee* in 1992. At the very least, our history reflects the absence of any tradition of government support for religious education; and in fact, historical aversion to public participation in religious education is well documented.

For the above reasons, the School District would prevail in this case regardless of whether it is analyzed using the *Lemon* test, an endorsement test, a noncoercion-proselytization test, or a historical traditions test. None allows the direct, ongoing involvement of the state in religious activities that the Zobrests demand here.

IV. THE SCHOOL DISTRICT IS NOT UNLAWFULLY INHIBITING RELIGIOUS PRACTICE

The Zobrests argue, for the first time, that the failure of the School District to provide to them the services of a sign language interpreter inhibits their ability to practice their religion in violation of the Establishment Clause. P.Br. at 23. In so arguing, they note that, without public funding, they must either bear the economic burden to hire an interpreter or send their child to a public school. P.Br. at 5. The Zobrests therefore conclude that they are being discriminated against on the basis of religion.

Initially, the School District notes that neither the above argument nor this case in general involves concerns that the Zobrests' right to free exercise of religion might be compromised. The Zobrests abandoned the free exercise claims that they previously had alleged against the School District. *See* Petition For Writ of Certiorari at 10, n. 9. Moreover, an Establishment Clause claim, based upon inhibition of religion or otherwise, was not raised by the Zobrests in either the District Court or the Court of Appeals. As such, their discrimination/inhibition argument should not be considered by this Court. *Youngberg v. Romeo*, 457 U.S. 307, 316 n. 19 (1982).

The Zobrests premise their discrimination/inhibition argument on the summary conclusion that, except for the School District's objection to the interpreter's involvement in religious activities, James otherwise would be "entitled" to receive the requested services under the IDEA. Contrary to the Zobrests' premature conclusion, however, the required applicability of the IDEA to the assistance demanded by the Zobrests was neither conceded by the School District[17] nor adjudicated by the

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[17] In its answer filed in the District Court, the School District specifically denied that the IDEA requires it to provide a sign language interpreter as requested by the Zobrests. JA 56, paragraph 15. Moreover, the only stipulation on this issue was that the School District would provide the interpreter at any *public* high school. JA 88, paragraph 13. The United States, as *amicus curiae*, and the Zobrests, although less forcefully, point out that in a pleading filed by the School District opposing the Zobrests' request for preliminary injunctive relief, the School District stated that the interpreter's services would have to be provided "so long as [James] is educated in a non-parochial setting." The United States and the Zobrests make too much of this statement. This pleading, filed only three days after the amended complaint was filed in August of 1988, and prior to the School District's answer being filed, never expressly discusses the issue of private, nonparochial schooling. The two educational options being discussed by the District and the Zobrests at that time (and, in fact, throughout this case) were Salpointe Catholic High School and the various public schools in the Tucson area. The School District was very careful to enter into a later stipulation for the purposes of the cross-motions for summary judgment that stated only that the interpreter services were mandated in a public school setting. JA 88-89. In any event, this issue is purely one of law and the law has evolved since 1988 to clarify that the services at issue here would not need to be provided in each case involving a private school setting, whether or not parochial. *See* text, *infra* at 46.

lower courts in this case. To the contrary, so long as the necessary special education-related services are available to James at a public school, the School District is not required in his individual case to provide the services at a parochial or nonparochial private school he chooses. *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 188 (1991). The United States, in its *amicus* brief filed on behalf of the Zobrests, agrees that the IDEA does not establish an individual entitlement to services for students placed in private schools at their parents' option, but only requires each state to offer private school students generally, but not individually, equitable opportunities to participate in services being offered to public school students. Brief of the United States as *Amicus Curiae* at 13, 22-23. The United States, through the Department of Education, reached this same conclusion when addressing a fact situation identical to that here. *See* Department of Education Opinion Letter dated August 13, 1990, 16 EHLR 1398 (1990), *quoted* in *Goodall, supra*, 930 F. 2d at 368.

There is no unconstitutional inhibition or discrimination when a school district refuses to provide a service available at a public school but not legally required to be provided in private schools, whether or not parochial.

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her own spiritual development or that of his or her family.

Bowen v. Roy, 476 U.S. 693, 699 (1986) (emphasis in original). Stated in another manner:

> The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.

Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).[18]

In addition, the School District's decision to deny the services requested here is supported by a compelling interest in avoiding a violation of the First Amendment that would result from state participation in religious activity. If the application of a generally applicable criminal statute is not affected by the religious demands of individuals, *Employment Division v. Smith*, 494 U.S. 872 (1990), then surely the avoidance of a constitutional violation must fare equally well.

Similarly, the School District's position in this case is justified by a compelling interest in ensuring the strict separation of church and state enjoyed by Arizona residents as referenced in the Arizona Constitution. Article II, Section 12 of the Arizona Constitution provides in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or

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[18] The fallacy of the Zobrests' "inhibition/discrimination" argument also can be demonstrated with reference to public aid schemes considered by this Court. Just because government *may* provide free textbooks and bus transportation to private school parochial and nonparochial students, *see Board of Education v. Allen*, 392 U.S. 236 (1968), *Everson v. Board of Education*, 330 U.S. 1 (1947), does not mean that the state *must* supply these items to such students.

instruction, or the support of any religious establishment. . . . " An identically worded clause in the Washington State Constitution has been characterized by this Court and has been determined by the Washington Supreme Court to be far stricter than the prohibitions in the Establishment Clause of the First Amendment. *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 489 (1986); *Witters v. State Commission for the Blind*, 771 P.2d 1119, 112 Wash.2d 363 (1989), *cert. denied*, 493 U.S. 850 (1989). In addition, Arizona Attorney General Opinion I88-072 (June 27, 1988), which addressed the Zobrests' demands made in this case, concluded that they would run afoul of the requirements of the Arizona Constitution. JA 94, paragraph 41; JA 9.

The School District either provided or offered to provide James Zobrest the educational opportunities to which he was entitled under the IDEA. Whether it voluntarily would have agreed to provide the services in a private school setting absent constitutional concerns is immaterial. In addition, the School District has done nothing to prevent James from following his religious beliefs. Rather, the School District merely has declined to require one of its employees to have day to day involvement in James' religious development. The Establishment Clause does not compel it to do otherwise.

CONCLUSION

Over twenty years ago, this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), referenced the three main evils

against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 612, *quoting Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The governmental activities requested by the Zobrests in this case, however, would involve the state in precisely these prohibited activities. If the Establishment Clause stands for anything, it must stand for the principle that a school district may not be required or even permitted to use its tax supported resources to participate directly and physically in the inculcation of religious values to primary and secondary school students. *See Everson v. Board of Education*, 330 U.S. 1, 15 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa.") In this case, the Zobrests demand that an Arizona school district and its administrators, employees and taxpaying constituents be judicially compelled to conform to the Zobrests' religious desires by placing a public employee in a parochial classroom on a continuing basis to facilitate religious indoctrination. No precedent by this Court has ever permitted ongoing, hands-on interaction between government and religion of the type at issue in this case, much less required it. To require the Respondent to do so now would repudiate decades of firmly established precedent.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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